

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 04-52 ERIE

YAKEEN ROGERS

SENTENCING

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Wednesday, October 11, 2006.

APPEARANCES:

MARSHALL J. PICCININI, Assistant United States
Attorney, appearing on behalf of the Government.

THOMAS W. PATTON, Assistant Federal Public

Ronald J. Bench, RMR - Official Court Reporter

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1 PROCEEDINGS

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3 (Whereupon, the Sentencing proceedings began at
4 10:00 a.m., on Wednesday, October 11, 2006, in Courtroom C.)

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6 THE COURT: This is the time we set for sentencing
7 in the case of United States versus Yakeen Rogers, at Criminal
8 No. 04-52 Erie. The defendant has filed a Position with
9 Respect to Sentencing Factors, arguing that his career offender
10 status is over-representative. We'll take up that issue.
11 There was also prepared a second addendum to the presentence
12 report. Mr. Piccinini, is the government going to be espousing
13 any particular issue here today?

14 MR. PICCININI: Yes, your Honor, I agree with Mr.

15 Lower's proposition that although obstruction of justice may

16 have occurred, there would be no practical reason for applying

17 two additional points because those points apply prior to the

18 career offender enhancement. I agree that there should not be

19 additional points applied to Mr. Rogers. However, I believe

20 that the probation officer's assessment that obstruction of

21 justice and three-point reduction for acceptance of

22 responsibility are inconsistent, that the guidelines authorize

23 this court and we would recommend to this court that because of

24 the defendant's failure to appear for his initial sentencing,

25 that you remove from the guideline calculations the three

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1 points credit for acceptance of responsibility. Obstruction of

2 justice, only in extraordinary cases, can go hand in hand with

3 reduction for acceptance. I think the case law and the

4 guidelines are very clear on that. When we get to the point of

5 argument, I will show to the court the Jason Smith case, where

6 you dealt with a similar issue and made rulings in that regard.

7 THE COURT: Is there going to be any testimony?

8 MR. PICCININI: No, there will not be testimony.

9 THE COURT: Mr. Patton, why don't we take up --

10 let's start with the 4A1.3 issue.

11 MR. PATTON: Your Honor, under Section 4A1.3, it is
12 our position that the career offender guideline does
13 significantly over-represent the seriousness of Mr. Rogers both
14 criminal history and offense level that is the result of the
15 consequence of the career offender enhancement. As your Honor
16 knows, the career offender enhancement not only results in an
17 increase in this case in the criminal history category, but it
18 also calls for a significant increase in Mr. Rogers' offense
19 level. The Third Circuit made clear in Shoupe that because

20 that's the way the career offender guideline operates, that the
21 courts in doing a downward departure in the career offender
22 context under 4A1.3 -- cannot only adjust criminal history
23 categories, but also offense levels.

24 There are three prior convictions that qualify as
25 either crimes of violence or controlled substance offenses for

1 Mr. Rogers. The two controlled substance offenses both involve

2 small amounts of drugs. In one case they didn't recover any
3 amount of drugs. Where the sales occurring in basically in an
4 open-air drug market in urban Erie.

5 As the Sentencing Commission had found in its
6 15-year study of the guidelines and how the guidelines have
7 impacted sentencing, the Sentencing Commission itself found
8 that the career offender guideline was disproportionately
9 affecting minority defendants. Because those minority
10 defendants most often times had prior drug convictions that
11 were the result of selling drugs in what the Sentencing
12 Commission characterizes as open-air drug markets in major
13 urban centers. In that it's much easier to investigate those
14 types of small drug activity that is going on basically in
15 public view and it's much easier to investigate that and those
16 cases are investigated, people are convicted more often. Than
17 cases where more affluent people may be using drugs, but
18 they're being more circumspect about how they're obtaining
19 their drugs and their use of the drugs. When you look at the
20 purpose of the career offender guideline to supposedly punish
21 what are supposed to be high-level drug dealers who have
22 repeatedly sold large amounts of drugs, Mr. Rogers just doesn't

23 fit into that category. When you compare Mr. Rogers' prior
24 sentences to other defendants who you have sentenced as career
25 offenders, you have a guy who gets convicted of selling around

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1 eight grams of crack cocaine, and then on the second case he's
2 being used as a runner for someone else and they don't obtain
3 any drugs at all. While yes, there are prior drug convictions
4 that count under the guidelines, they can only be described as
5 minor.

6 THE COURT: Is the amount of drugs, excuse me, is
7 the amount of drugs involved in any of the predicate offenses
8 an appropriate consideration for me as to whether or not a
9 departure is justified?

10 MR. PATTON: I think it is in two ways. Number one,
11 I think it is absolutely foolish and disingenuous for a court
12 to say I'm going to treat someone who has been convicted of
13 distributing 10 kilos of cocaine in their prior convictions,
14 the same as I'm going to treat someone who has distributed 10
15 grams of cocaine in their priors. That is simply acting like
16 an ostrich in saying prior drug convictions that's it, I'm not

17 looking at anything more, Mr. Rogers gets treated the same as
18 somebody who's been in front of courts on two separate
19 occasions for dealing kilogram amounts of cocaine. The
20 guidelines themselves, the whole structure of federal drug
21 sentencing is based on the amounts of the drug that are being
22 distributed. The penalty scheme under Title 21, U.S. Code,
23 Section 841(b), is linked to the type of drug involved and the
24 amount of drug involved. That's what sets the mandatory
25 minimums, that's what sets the statutory maximum. For a drug

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1 offense under the Sentencing Guidelines where Section 2D1.1
2 applies, the entire base offense level is different by the
3 amount of the drug involved. So why should it be that when you
4 are getting sentenced for a drug offense in federal court, that
5 the driving factor behind the sentence is the quantity of the
6 drug involved. Unless you are a career offender. And then if
7 you're a career offender, the amounts of drugs involved make no
8 difference. And we treat everybody the same, regardless of how
9 much drugs are involved in the case. It creates an unexplained
10 and unwarranted disparity in the guidelines. It is changing

11 the basic sentencing structure of the guidelines.

12 And so for that reason I'd say it is you can look at
13 the amounts. And, second, another related reason, that relates
14 to the amounts, there is case law that we lay out in our papers
15 that says you can look at the sentences that the defendant
16 received on his prior cases and for someone who has received
17 relatively small sentences in state court, that you as the
18 sentencing judge here can look at those to make it a
19 quantitative determination that those convictions were not as
20 serious as some other convictions that you have seen in the
21 past, and can say that because the prior sentences in this
22 case, I mean on the one case, the conspiracy conviction, Mr.
23 Rogers received 12 months.

24 THE COURT: Let me ask you this. Isn't it true,
25 though, that at the end of the day in trying to determine in a

1 career offender situation whether it's over-representative, the
2 focus is whether or not career offender status inappropriately
3 reflects the likelihood of continuing recidivistic activity,
4 essentially?

5 MR. PATTON: No, that is one aspect. Section 4A1.3

6 talks in the disjunctive --

7 THE COURT: And the other part --

8 MR. PATTON: Or just overstates, significantly

9 over-represents the seriousness of the criminal history.

10 THE COURT: Thank you, is in the conjunctive. But

11 in this particular case, isn't it, aren't I required to get

12 above the trees and look down at the forest. He has a terrible

13 criminal history, it's repetitive, it's occasionally violent.

14 Isn't it appropriate for me to look at the whole package rather

15 than to focus exclusively on the individual predicate offenses,

16 how can I not do that?

17 MR. PATTON: When you are ultimately determining the

18 sentence that you feel is appropriate, you of course have to

19 look at all of Mr. Rogers' prior convictions, as well as all

20 the factors that you are directed to look at under Title 18,

21 Section 3553(a). But the reason in the career offender

22 situation that it is appropriate for you to look at the

23 particular predicates is because that, those particular

24 predicates are what's driving the massive increase in Mr.

25 Rogers' sentence. Because even if you accept all of Mr.

1 Rogers' prior convictions, he should be in criminal history
2 category V under the guidelines, not in criminal history
3 category VI. The guidelines had taken all that into account.
4 The guidelines, however, carve out particular predicate
5 offenses that will cause a massive increase in a particular
6 defendant's sentence under the career offender guideline.
7 Because the guidelines do that, it is necessary in a career
8 offender case, that you do look at those predicates. And it is
9 appropriate for you to say, all right, I am now focusing my
10 attention, when you're ruling on our motion under 4A1.3, you
11 have to narrow your universe down to people who qualify for the
12 career offender enhancement. And then look at, okay, compared
13 to that universe of people, look at the predicates that make
14 Mr. Rogers a career offender. And try and compare those to
15 other folks that have the career offender apply to them. And
16 it is appropriate and it is permissible for you to look at it
17 and say, you know, as far as this massive increase that goes
18 along with career offender, based on the predicates that are
19 resulting in that increase, I find that that over-represents
20 the seriousness of the criminal history.

21 Now, then, when you decide what am I going to do
22 about that, you look at all of the criminal history. And all
23 the other factors under the law that you're entitled to and
24 required to look at, to say, all right, if I'm going to do
25 something about career offender, I'm going to depart, how far

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1 am I going to go. Well, I'm not going to go as far with Mr.
2 Rogers as I would with someone who has no other convictions at
3 all, except the two predicates that made him a career offender.
4 So the broader picture does come into play once you have made
5 the decision does the career offender guideline significantly
6 over-represent the seriousness of the criminal history.

7 THE COURT: All right, I have your point. Is there
8 something else you want to tell me on the point?

9 MR. PATTON: The only other thing I would mention is
10 on the simple assault conviction, I understand that this has
11 been briefed to your Honor before and I've argued it to you
12 before, it continues to be our position that because
13 Pennsylvania treats simple assault in a manner that is
14 significantly different than the vast majority of jurisdictions

15 in the United States, that that is a situation where it is
16 appropriate for you to come in and say, look, I understand that
17 the guidelines, in the desire to try and get consistency in
18 sentencing across the country, that the guidelines have a broad
19 general definition of what counts as a crime of violence. And
20 the states label as a misdemeanor or felony is not controlling.
21 But when one state treats an offense so differently than the
22 rest of the country does, if you hard headedly refuse to
23 acknowledge that this particular state's unique way of handling
24 this is skewing the guidelines, then you are allowing the
25 guidelines to be distorted. And that's the reason why, even

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1 when you're treating, looking at the guideline themselves, not
2 even necessarily under your Booker discretion, just calculating
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3 the correct guideline itself, the guidelines say look, judge,
4 there are situations where departures may be appropriate when
5 something is happening that's not foreseen by the Sentencing
6 Commission, that's causing the guidelines to be thrown out of
7 whack. And Pennsylvania's treatment of the simple assault

8 offense results in that.

9 THE COURT: All right, thank you, Mr. Patton. All
10 right, Mr. Piccinini.

11 MR. PICCININI: Your Honor, first of all, with
12 regard to the argument that the only reason why this defendant
13 is a career offender and at the level he finds himself is
14 because of relatively minor drug dealing activity, there is
15 just a factual inaccuracy on that. Because the drug dealers
16 that you have sentenced as career offenders, and you will
17 recall this, who dealt larger levels of drugs, the kilos, as an
18 example that was provided to the court today, are actually
19 treated differently under the career offender guidelines.

20 There are different sections of the career offender
21 enhancement. At the highest level, those individuals who face
22 life imprisonment as a maximum. And those would be the
23 individuals who have dealt greater than 50 grams of crack
24 cocaine, those are the kilo examples. They're guidelines under
25 career offender is level 37. Individuals such as the

1 defendant, whose maximum penalty is just greater than 25 years

2 but not greater than life, face a career offender level of 34.

3 So the disparity between those larger level distributors and

4 other equally serious distributors but not by way of the

5 quantity of drugs, are already handled differently under the

6 career offender provisions. This defendant finds himself at a

7 level 34. If he was at level 37 prior to pleading, his

8 guideline range would be 360 months to life.

9 Just as other career offenders who have been before

10 you with larger levels of drugs, have faced 360 to life. This

11 defendant does not find himself in that position. Specifically

12 because of the maximum penalty that applies, that maximum

13 penalty applies because of the quantity of the drugs that were

14 involved in this offense. In addition, there is a difference

15 between how 4B1.1, the career offender provision, tells you to

16 look at or what particular offenses to look it, than there is

17 under 4A1.3.

18 Under 4B1.1, you are just to look at those

19 particular offenses that give rise to the career offender

20 status. That would be the prior drug delivery convictions and

21 the simple assault. No dispute here that this defendant meets,

22 under any combination of those three, find any two of them and

23 he's a career offender. However, when we get to 4A1.3, and the

24 defendant has asked for a downward departure from career

25 offender, you're not limited to just looking at the qualifying

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1 convictions, simple assault and two prior drug distributions,

2 and that makes sense.

3 Now, what we're looking at is the entire breadth of

4 this defendant's criminal history. That's what we really want

5 to look at. Is he a career offender that in light of all his

6 criminal history, even beyond the ones that are specifically

7 calculated in career offender, does he really deserve to have a

8 lower sentence or is he really the career offender that the

9 guidelines look to. I think your question earlier of counsel

10 is whether you should look at the quantity as to those prior

11 drugs. And I think there's sound reason why that should not be

12 your focus. I think it's clear under 4A1.3 that really what

13 you ought to be looking at is the pattern and the timing of the

14 defendant's prior convictions, not the specific details of

15 those offenses. Because really you're left with the law

16 enforcement determination of how many deals did the defendant

17 engage in. Or the luck of the defendant having been caught

18 after a smaller level deal, as opposed to a larger level deal.
19 And if you look at one of his priors, you actually find out
20 that there were two separate deliveries, which were charged in
21 the same offense as part of a criminal conspiracy. So if
22 you're going to look at the facts of those particulars, they
23 don't bode very well for Mr. Rogers. But I think what you
24 ought to be looking at is the timing and the pattern of his
25 criminal history. And then determine is he really someone

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1 whose criminal history is significantly over-represented by the
2 career offender provisions. And in no way, as you indicated,
3 he has this horrendous prior record, extending back to the age
4 of 13 on. And I know some of that stuff is juvenile in nature,
5 but look at the whole breadth and length of it. Look at the
6 pattern and timing of the criminal activity. What you find is
7 from the age of 13, the defendant sitting here in the courtroom
8 today, you have an extensive pattern of criminal activity.
9 Including crimes of violence, crimes of other drug
10 distribution, very clearly indicating a significant recidivist
11 concern for the court that this defendant does not receive the

12 career offender enhancement at the levels that are requested.

13 And I think counsel's point that the career offender, the 4A1.3

14 provision is in the disjunctive, that it's either or, that's

15 fine, but for the defendant to get a reduction --

16 THE COURT: I think his point was it was in the

17 conjunctive.

18 MR. PICCININI: Excuse me, it's in the conjunctive.

19 But the point being is you have to have either one or the

20 other. He may be able to claim that all his priors are not

21 that serious. But he can't claim that the defendant does not

22 show over his entire history since the age of 13, a very clear

23 indication of the likelihood that he would commit additional

24 criminal offenses.

25 And the final point on that, look at what the nature

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1 of the criminal convictions are. It's the same thing that he's

2 in court for here today. Now for the third time, and then add

3 to it the simple assault convictions, clearly he is not

4 deserving of a downward departure because of

5 over-representation. Here, it's likely to be under-represented

6 because he has one conviction even beyond what is necessary for
7 career offender status.

8 THE COURT: Let's switch gears now, let's address
9 first the government's contention relative to the probation
10 officer's second addendum to the report, which involves the
11 entitlement or lack thereof to the three point acceptance of
12 responsibility?

13 MR. PICCININI: Although, I have not requested the
14 opportunity to take testimony in this regard, just so there is
15 a factual record in order for you to find that the defendant
16 obstructed justice, this is an obstruction that actually
17 occurred in the court's presence, not requiring any testimony.
18 But I would just refer the court to what is document 33 in the
19 record here, which is your order dated June 19, 2006. Where
20 you specifically found the defendant failed to appear for
21 sentencing, and that you issued a bench warrant for his arrest.

22 And then, in addition, at document 35 within the
23 criminal record, is United States Magistrate Judge Baxter's
24 determination on the 25th of August, 2006, after the defendant
25 came back into custody at that particular time, detaining him

1 and granting the government's request for detention. So the
2 period of time during which the defendant remained a fugitive
3 was from the 19th of June, when he failed to appear, up until
4 August of 2006, where he had to have his bond revoked and he
5 was detained pending sentencing here today. So I would submit
6 for your review those documents, rather than marking them as
7 exhibits because they are part of the record, to support a
8 finding that the defendant failed to appear. And it's very
9 clear under the law that a failure to appear for sentencing is
10 an indication of obstruction of justice. Once that finding is
11 made, your Honor, the case law is very clear that both in the
12 guideline itself, as is referenced by the probation officer,
13 and in the case law, and I indicated --

14 THE COURT: I don't have any case law from anybody
15 on the point. I found some on my own.

16 MR. PICCININI: There is one in particular that I
17 knew the court was familiar with, that would be your
18 determination in the Jason Smith 2255 case. Where there was a
19 claim related to the ineffectiveness of prior counsel. And in
20 that case the argument by Mr. Smith was that there were

21 circumstances that gave rise to, even though he went to trial,
22 he should have received acceptance of responsibility. And in
23 your opinion in that case, you made it very clear that Mr.
24 Smith's argument was not worthy of credence because this was a
25 case where you had already found Mr. Smith had obstructed

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1 justice and you referenced those same provisions that we argue
2 here today, indicating that it is only the extraordinary case
3 where someone can obstruct justice and still receive credit for
4 acceptance of responsibility.

5 THE COURT: Can I see what I said?

6 MR. PICCININI: Yes. I gave a copy of this to
7 counsel.

8 THE COURT: On the question -- let me come at it
9 this way. This Application Note 4 to 3E1.1, says that conduct
10 resulting in an enhancement under 3C1.1 ordinarily indicates
11 the defendant has not accepted responsibility for his criminal
12 conduct. There may, however, be extraordinary cases in which
13 adjustments under both 3C1.1 and 3E1.1 may apply. Then it goes
14 on to say -- the sentencing judge is in the unique position to

15 evaluate a defendant's acceptance of responsibility. So then
16 the question which occurred to me was, well, what's the
17 appropriate considerations or what should I take into account
18 in determining whether something is or is not extraordinary.
19 There's some case law out of the Eighth Circuit, some other
20 places, that apply a totality of the circumstances analysis to
21 determine whether a case is extraordinary. And they say you
22 should consider, among other things, whether the obstructive
23 conduct was an isolated incident. Whether it was voluntary or
24 involuntary -- let me say that again. Whether it was
25 voluntarily or involuntarily terminated. Whether the defendant

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1 admitted and recanted his obstructive conduct. And to what
2 degree he accepted responsibility and aided the prosecution.
3 Then the court in this particular case goes on to say the
4 phrase extraordinary cases refers to a narrow set of
5 occurrences that are extremely rare and highly exceptional.
6 That appears to be kind of a commonly accepted test. How would
7 that test, how would the government apply the facts of this
8 case to that test?

9 MR. PICCININI: Your Honor, when you look at the
10 totality of the circumstances in a situation where a defendant
11 flees the jurisdiction and fails to appear for sentencing, as
12 opposed to some other obstructive conduct. What you're looking
13 for, judge, is this defendant, after entering a plea of guilty,
14 truly contrite with regard to the criminal conduct that he
15 engaged in. Part of his contrition, part of his actual
16 acceptance of responsibility is, obviously, the acceptance of
17 the sentence that will be imposed. We allow the defendant to
18 remain out on conditions of release after his change of plea.
19 We believed that he accepted responsibility and he will show up
20 to face the punishment before him. But a defendant who, after
21 pleading guilty and when facing significant time, flees the
22 jurisdiction, under a totality of the circumstances, how can
23 you indicate here today that that defendant who is willing not
24 only to plead guilty to the offense, but also accept the
25 punishment that was being imposed by the court. And I think if

1 you look at those particular facts, because we don't know of
2 any more details.

3 THE COURT: How long was he gone?

4 MR. PICCININI: He was gone from June 19th of 2006,
5 at least the date we knew he was not here in court, until
6 August of 2006.

7 THE COURT: Where did he go?

8 MR. PICCININI: We had information throughout the
9 investigation that he fled to the Atlanta, Georgia area.
10 Members of the EAGLE Task Force actually had to put out fliers
11 in local newspapers with the defendant's picture, trying to
12 discovery his whereabouts. We actually sent leads to law
13 enforcement officers in Georgia in order to find the defendant.
14 We were unsuccessful. I can indicate to the court that Mr.
15 Rogers came back from wherever he was and he was apprehended
16 after turning himself in to law enforcement.

17 THE COURT: Here in Erie?

18 MR. PICCININI: Here in Erie, yes.

19 THE COURT: Did agents go down and look for him?

20 MR. PICCININI: Agents from here did not have to go
21 down and look for him, but we actually submitted requests for
22 that activity in the Atlanta, Georgia area through the FBI
23 channels.

24 THE COURT: So, basically, to the extent it may or

25 may not be relevant, you don't know today exactly where he was?

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1 MR. PICCININI: We do not, no. We had information
2 that he was located down there. He was not apprehended in that
3 location and he did end up coming back to the Erie area.

4 THE COURT: Was there any indication that he, while
5 on the run, he engaged in any other criminal conduct?

6 MR. PICCININI: Not that we know of, your Honor.
7 Your Honor, I have a recent example of the difference. This is
8 a difference where the government had not even requested.
9 We've had recent cases where individuals failed to appear for
10 their change of plea hearing, one that they scheduled on their
11 own. And by failing to appear for the change of plea, a bench
12 warrant was issued for their arrest, they were on the run and
13 they came. When they came back, the government was now dealt
14 with assessing have they really negated their acceptance of
15 responsibility. Well, no, they hadn't accepted responsibility.
16 The day they came back and were arrested, they came in and
17 entered a change of plea. Well, that's clearly someone who,
18 from the time we look at their conduct at the date of their

19 plea, accepted responsibility from that point on, after
20 accepting responsibility, showed they were worthy of credit.
21 Here's a defendant, however, who enters his change of plea,
22 indicates to the court I'm willing to accept the lumps for the
23 crime I committed, when getting close to the sentencing date,
24 he runs away, judge. And I understand that he was probably
25 scared, there's a lot of time he's facing. But there's a

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1 difference between the person who runs away and is not
2 accepting responsibility and the person who stands before the
3 court, which is the vast majority of defendants who enter pleas
4 of guilty and stand up at the time of sentencing and still
5 maintain their acceptance of responsibility. And I think
6 because we're lacking some of those facts, I can't argue to you
7 any more, it just seems highly likely that defendants who fail
8 to appear for their sentencings after entering pleas of guilty,
9 are in a completely different position than those defendants
10 who show up for their sentencing and take the sentence that
11 they deserve.

12 THE COURT: All right, let me hear from Mr. Patton

13 on this. I need, to the extent you can, I'm flying a little
14 blind on all the details of this flight and whatnot. Insofar
15 as it is might inform me whether or not this is an
16 extraordinary exception?

17 MR. PATTON: Your Honor, with regard to the dates,
18 June 19th was the date that the original sentencing was set
19 forth. Mr. Rogers turned himself into the Erie Police
20 Department across the street on August 24th of 2006. At that
21 time the Erie Police Department contacted the Marshals and the
22 Marshals came down and took Mr. Rogers into custody. We had a
23 hearing in front of Judge Baxter the next day, on the 25th.
24 Did not contest that the conditions of bond had been violated
25 and so she entered a detention order. So I would submit to you

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1 that Mr. Rogers, if you're considering not showing up for the
2 hearing, if you say, okay, that's an obstruction of justice.

3 THE COURT: It clearly is.

4 MR. PATTON: It's an isolated incident, it's not a
5 continued pattern of activity. He voluntarily terminated that
6 conduct by turning himself in. He wasn't arrested. He came in

7 of his own volition, realizing that he couldn't go on the way
8 he was, he needed to turn himself in and face the consequences
9 of this case and face the consequences, not only of what he was
10 looking, but the consequences of not appearing. And so he made
11 that determination that he had made a mistake and he had to
12 rectify it to the best of his ability, which at that point was
13 turning himself in. Which he did. And I do think that that
14 allows you to look at the totality of the circumstances and
15 say, okay, from the time he was charged until the time he pled
16 guilty, no obstructive conduct, he came in he pled guilty in
17 front of your Honor. He then met with the probation office, we
18 did a presentence interview, a presentence report was prepared.
19 His act of obstruction is not showing up for the sentencing
20 hearing. But he then realized he had made a mistake and turned
21 himself in. Knowing that turning himself in was going to
22 result in him sitting in front of you getting sentenced for the
23 offense that he pled guilty to and with the extra burden thrown
24 in there that he hadn't shown up, and he knew there was going
25 to be some extra penalties for that.

1 So that you can look at the case and say, all right,
2 he pled guilty, he files no motions, just comes in and pleads
3 guilty. While he did fail to appear, he turns himself in and
4 accepts the consequences of turning himself in and says, all
5 right, I did it, I'll face the music. And that's what
6 acceptance of responsibility is at the end. It's the defendant
7 saying look, I'm looking at what I did, I know that it's wrong.
8 And I accept that it's wrong, I'll tell the court that it's
9 wrong and I'll accept the consequences of my actions. And
10 really by -- by him turning himself in, I guess there is no
11 other way to turn yourself in other than by yourself, but by
12 turning himself in, that in and of itself is an acceptance of
13 responsibility. Of saying I screwed up and I have to fix it.
14 And the only way to fix it is to march yourself down to the
15 police station. Knowing that you're looking to going to jail
16 at a minimum of 15-and-a-half years and that's even before the
17 court takes into consideration what they're going to do about
18 your failure to appear, to go into the police station knowing
19 I'm never going to walk out of prison, I mean I'm never going
20 to walk out of custody for a minimum of another 15-and-a-half
21 years. It's a tough thing to do, but Mr. Rogers did it.

22 I'm not saying that it makes it okay for him not to

23 have appeared initially, of course it doesn't. But when you

24 are looking at the totality of the circumstances to decide is

25 this a cases that's out of the ordinary, when it comes to

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1 getting obstruction and getting acceptance of responsibility,

2 that is extraordinary. It is different. It's different from a

3 person that fails to appear, goes on the run, does everything

4 they can to avoid detection by law enforcement, but law

5 enforcement still tracks them down and arrests them and drags

6 them back. If you and, again, I'm not saying that it wasn't

7 wrong not to appear for his sentencing. But if you put

8 yourself in a position of somebody who's panicked and made a

9 really dumb decision because they were looking at a really long

10 prison sentence, then they're sitting there thinking what do I

11 do. Do I try and tough it out and just hope and pray that I

12 can avoid law enforcement for the rest of my life, or do I just

13 say, well, even if I'm going get caught, I'm going to ride this

14 as long as I can ride it and just make them come and get me.

15 Or do you sit there and think you know what, what I did was

16 dumb, and it was wrong, and I got to do something about it and

17 I got to face the music. And so even though I know I'm going

18 to go to jail for a long time, I got to go and turn myself in

19 because that's the right thing to do. Mr. Rogers should not be

20 in the same boat as somebody who fails to appear, goes on the

21 run, does everything they can do to avoid being caught and

22 eventually is only brought back into court to face the music

23 because law enforcement tracked them down.

24 THE COURT: So basically then, in a nutshell, it's

25 your position that what makes this the extraordinary case,

24

1 where you can still get your acceptance, is the fact that this

2 defendant turned himself in rather than was caught?

3 MR. PATTON: Correct.

4 THE COURT: Is that pretty much it?

5 MR. PATTON: Yes. And I do think that makes it

6 extraordinary, that it is different than the ordinary. I would

7 hasten to guess that your Honor hasn't seen a lot of cases

8 where you've issued bench warrants for people who have failed

9 to appear, then the person themselves comes back in and says

10 here I am, I screwed up.

11 THE COURT: Sometimes they never come back.

12 MR. PATTON: Yes. And so that does make the case
13 extraordinary. Which extraordinary just simply means it's not
14 ordinary.

15 THE COURT: All right, let me hear what he has to
16 say about this, then we'll start to wind this down. Is it of
17 some moment, Mr. Piccinini, that rather than continuing to hide
18 wherever he was hiding, that he apparently on his own volition
19 returns to Erie and marches into the police station?

20 MR. PICCININI: It may be of some moment as to where
21 within the guideline range you sentence the defendant.
22 However, with regard to whether or not his obstruction,
23 obstructive conduct, is the exceptional case where acceptance
24 of responsibility should still apply, I don't think that it is
25 of such moment as to preclude you from denying that acceptance

25

1 of responsibility. Because here, as we've indicated, this
2 defendant was on the run for three months. Excuse me, for two
3 months -- for three months, from June through August. On the

4 run for that period to time, while we've indicated to you that

5 law enforcement was looking for him, they put out notices and

6 fliers in the local newspaper and I'm going to mark one as an

7 exhibit for purposes of the record. They made contact with

8 other states where the defendant was. So he knew the pressure

9 was on and that he eventually would be caught. I don't think

10 that that shows the contrition that is necessary. And I would

11 provide to the court a case out of the Ninth Circuit, United

12 States_v._Thompson, at 80 F.3d 368, a copy of which I already

13 provided to counsel.

14 THE COURT: Could you say that again, please?

15 MR. PICCININI: Yes, United_States_v._Thompson,

16 T-h-o-m-p-s-o-n, this is 80 F.3d 368.

17 THE COURT: What does it stand for?

18 MR. PICCININI: This discusses whether or not the

19 defendant after being returned into custody after failing to

20 appear, whether their contrition and the sorrow that they

21 expressed to the court are sufficient for the court to find it

22 to be the extraordinary case. This isn't one factually that's

23 identical to ours, but I think the language of the court

24 setting forth how that failure to or that ability to give the

25 acceptance of responsibility, even in light of an obstruction,

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1 is really only in the extraordinary cases. And, basically, all
2 you have before you, you have no factual reason for the
3 flights. Something, was there some sympathetic reasons. Was
4 there a dying family member, was there a child that need to be
5 attended to. Was there something that caused the flight, other
6 than that lack of acceptance of responsibility. Here you have
7 not. Was there anything out there that would indicate both
8 acceptance and obstruction of justice points being appropriate,
9 applicable, and there is not. And the defendant's claim that
10 he knew he had to do the right thing, I don't think is worthy
11 of extraordinary acceptance application in this case. I would
12 provide a copy of that particular case to the court.

13 THE COURT: Are you moving those fliers now?

14 MR. PICCININI: Yes, your Honor.

15 THE COURT: What are they again for the record?

16 MR. PICCININI: This is the FBI's clipping of the

17 EAGLE Task Force notice to local community, with a picture of

18 Mr. Rogers, seeking information about his whereabouts, which is
19 dated July 25, 2006. The clipping of the Erie newspaper and
20 the FBI indications of their submission to it are on this
21 particular document, I would move this as Government Exhibit 1.

22 THE COURT: It's admitted. Before we move on here,
23 Mr. Patton, I guess this is up to you. Rather than waiting for
24 the allocution part of this sentence, it strikes me that given
25 the paucity of information, the flight and the reasons, all

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1 those other factors that might be informative to me, that
2 perhaps you might want to make a decision, along with your
3 client, as to whether this would be the time to fill in or
4 connect the dots for me. I'm going to take a short recess, you
5 can talk to him about that.

6 (Recess from 10:44 a.m.; until 10:55 a.m.)

7 THE COURT: Mr. Patton.

8 MR. PATTON: Mr. Rogers would like to make a
9 statement to you now rather than wait until his right of
10 allocution.

11 THE COURT: Have him come on up to the podium.

12 MR. PATTON: Mr. Rogers does not want to give a

13 detailed rundown, he doesn't want to cause any problems.

14 THE COURT: I understand that. I'm giving you and

15 him an opportunity to address those issues as you see

16 appropriate, that would inform my analysis as to whether this

17 is anything other than the run-of-the-mill absconding case or

18 whether it's extraordinary.

19 MR. PICCININI: Your Honor, is this his allocution

20 right or is this sworn testimony?

21 THE COURT: It's about to be sworn testimony.

22 MR. PICCININI: Then he would be subject to being

23 cross-examined?

24 THE COURT: Yes, he is. Would you please swear him

25 in.

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1 THE CLERK: Would you please raise your right hand.

2 YAKEEN ROGERS, DEFENDANT HEREIN, SWORN

3 DIRECT EXAMINATION

4 BY MR. PATTON:

5 Q. Yakeen, is it accurate to say you didn't show up for your

6 sentencing when it was first scheduled?

7 A. Yes.

8 Q. And after you didn't show up for your first sentencing,

9 was there a period of time where you were just out on the

10 street?

11 A. Yes.

12 Q. After you had been out on the street for a couple of

13 months, at some point did you decide to or did you think about

14 turning yourself in?

15 A. The whole time that I was out there for the two months.

16 Q. And did there come a point when you did in fact turn

17 yourself in?

18 A. Yes, August 24, 2006.

19 Q. How did you turn yourself in, what did you do?

20 A. I went to the federal building but it was closed, it was

21 like 5:15, 5:30, it was closed. So I walked across the street

22 to the Erie Police Department and told them I was there to turn

23 myself in. And they searched the computer for a warrant, they

24 said they didn't have a warrant, what I was turning myself in

25 for, and I told them I had a federal warrant. Then they called

1 the Marshals, they came and placed me in the Erie County

2 Prison.

3 Q. The Marshals did?

4 A. Federal Marshals, yes.

5 Q. Why did you decide to turn yourself in?

6 A. Tired, too stressful, tired of running. I knew it was

7 the right thing to do. As far as not showing up for the

8 hearing, it was stressful on me, stressful on my family

9 members, and I knew it was the right thing to do.

10 Q. When you said you knew it was the right thing to do, are

11 you referring to turning yourself in?

12 A. Yes, I'm referring to turning myself in.

13 Q. Why did you think it was the right thing to do?

14 A. It was too stressful on myself. And I knew that, like I

15 said, that I was doing the right thing by turning myself in.

16 Q. Did you believe that you were wrong when you didn't show

17 up for your original sentencing?

18 A. Yes.

19 Q. Did you think turning yourself in would somehow at least

20 help to account for not showing up originally?

21 A. I thought it would.

22 MR. PATTON: Those are my questions, your Honor.

23 THE COURT: All right. Mr. Piccinini.

24 CROSS-EXAMINATION

25 BY MR. PICCININI:

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1 Q. Mr. Rogers, isn't it true that while you were on the run,
2 you remained in contact with your family members, not only here
3 in Erie but also family members in Virginia and Georgia?

4 MR. PATTON: I'm going to object, your Honor, that's
5 beyond the scope of what was asked.

6 THE COURT: I think it is.

7 MR. PICCININI: My point is going to be that the
8 defendant turned himself in because he had heard, based upon
9 our interviews with his family members in Virginia and Georgia
10 and locally, that we were looking at him and closely on his
11 tail --

12 THE COURT: You can ask him that. He and his
13 counsel, he, through his counsel, agreed to do this under a
14 more limited basis. But I think you can ask the question
15 without getting into the specifics as to who he was with and

16 that type of thing.

17 BY MR. PICCININI:

18 Q. Mr. Rogers, after law enforcement officers went to the
19 Norfolk, Virginia area and discovered that your sister was
20 deployed, you were aware of the fact that law enforcement
21 actually talked with your sister-in-law's husband to find out
22 where you were, weren't you?

23 MR. PATTON: Objection.

24 MR. PICCININI: Judge, I'm not looking to seek
25 anybody's indictment for assisting --

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1 THE COURT: Go ahead, ask the question.

2 BY MR. PICCININI:

3 Q. Isn't it true that you knew that your sister, who was
4 deployed at the time, had been stationed at the Norfolk naval
5 base, that you knew we talked with your brother-in-law there in
6 Norfolk, isn't that true?

7 A. No, I didn't know that. I knew she was deployed because
8 a few months prior to me leaving -- excuse me, a few months
9 prior to her leaving out to deployment, they were here in Erie,

10 I knew she was going to be deployed to go out to sea for nine
11 months.

12 Q. That's not my question. Isn't it true that you knew that
13 law enforcement officers were looking for you in Virginia?

14 A. Yes, I heard that they were there.

15 Q. You heard that from someone telling you that the law
16 enforcement officers were there?

17 A. Correct, a family member here because this is where I was
18 is here.

19 Q. Weren't you also familiar with the fact that law
20 enforcement officers went to Georgia, to the Atlanta area, and
21 talked with your uncle there to find you?

22 A. No, I wasn't. When the Marshals took me to my hearing
23 pertaining to my bond, that's when someone told me that they
24 had heard that I was in Atlanta. Which I told them I was not
25 in Atlanta.

1 Q. Did you hear from family members that we thought you were
2 in Atlanta?

3 A. No, I heard it from -- I don't know his name, him right

4 there, with the orange hoody on.

5 Q. From Trooper Jeff Tylman from the EAGLE Task Force?

6 A. Yes.

7 Q. You mean after you got arrested?

8 A. Yes, that was my first knowledge of that at all.

9 Q. And while you were on the run, you're claiming today that

10 you stayed in the Erie area, is that correct?

11 A. Yes.

12 Q. Isn't it true that while you were in the Erie area, you

13 had the opportunity to see yourself in the newspaper?

14 A. Yes.

15 Q. You saw it on a regular basis?

16 A. I seen it, yes.

17 Q. And you saw the fact that law enforcement, they weren't

18 just laying back, they actively were trying to find you in the

19 area, isn't that true?

20 A. I wouldn't know that because I wasn't out and about, I

21 couldn't be out and about.

22 Q. Why?

23 A. Because they would have apprehended me. I mean, I took

24 the time and thought about what I did and knew it was wrong,

25 that's why I turned myself in on my own.

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1 Q. Well, let's talk about June 19, 2006, when you were
2 supposed to show up and face the penalty that Judge McLaughlin
3 was going to impose on you. Isn't it true that prior to June
4 19th, you sat down and you went through the presentence report,
5 isn't that true?

6 A. Yes.

7 Q. Isn't it true that in going go through that report, you
8 found out that you were looking at a sentencing guideline of
9 188 to 235 months?

10 A. I knew that beforehand.

11 Q. You probably knew prior to your plea that your guidelines
12 would probably be 188 to 235?

13 A. I knew that from the time I started consulting with my
14 attorney, he told me the range.

15 Q. And isn't it true your reason for not showing up on June
16 19th is because there is no way you were going to jail for 188
17 to 235 months; you were not willing and able to do that on June
18 19th, were you?

19 A. No, it wasn't that, I was scared and stressed out.

20 Q. You were scared, unwilling to come and accept your

21 punishment on June 19, 2006, that's why you didn't come in?

22 A. Exactly. But I myself sat back and thought about what I

23 was doing and knew that it was wrong for me not to show and

24 that's why I turned myself in. As I said, it was too stressful

25 on myself and I knew I couldn't go on like that. And that's

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1 why I turned myself in because I knew it was the right thing.

2 Q. You're saying that you knew it was the right thing, but

3 when you were first asked the question, you said it was too

4 stressful on you and your family to be on the run like that, so

5 you really turned yourself in because you were sick of being on

6 the run?

7 A. No, I wasn't on the run, it was the fact that I knew

8 that -- my immediate family was worried about me. And I told

9 them I'm going to turn myself in.

10 Q. Because of the pressure from your family or the stress

11 you were putting on your family by being on the run?

12 A. The stress I was putting on myself.

13 Q. From being on the run, you couldn't handle the pressure
14 because the EAGLE Task Force had put your name in the paper,
15 people saw that you were on the run, you knew on a daily basis
16 that you were going to get caught, that's what you were
17 stressed about?

18 A. No, I was stressed out because I was stressed of my own
19 will.

20 Q. But what were you stressed about, about the fact you were
21 about to get caught, isn't that true; the fact you had to look
22 over your shoulder the whole time that you were out because you
23 were afraid you were going to get caught?

24 A. That's what I was stressed about, about me, my own will,
25 I wasn't stressed about them -- the task force catching me.

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1 Q. So you were stressed because while you're out on the run,
2 you had to look over your shoulder, getting worried you were
3 going to get caught?

4 A. And I knew it was the right thing to do.

5 Q. Why wasn't it the right thing to do on June 19, 2006,
6 when you indicated to the judge after you were released,

7 continued to be released on bond, that you'd be here?

8 A. Because I was thinking about the time, that's a lot of

9 time I was facing. And I had to sit down and take it all in.

10 After I did that, I turned myself in.

11 Q. It wasn't enough time for you to take it all in from the

12 time you entered your guilty plea back on March 9, 2006 to June

13 19, 2006, that wasn't a good enough time period for you to take

14 it in and accept the fact that you were going to get sentenced?

15 A. Apparently I wasn't ready.

16 MR. PICCININI: That's all I have, your Honor.

17 THE COURT: Do you have anything else?

18 MR. PATTON: Yes, your Honor.

19 REDIRECT EXAMINATION

20 BY MR. PATTON:

21 Q. Yakeen, looking back on it now, do you think it was a

22 mistake for you not to show up on June 19th?

23 A. Yes, it was.

24 Q. And if you had to do it all over again, would you show up

25 on June 19th?

1 A. Yes, I would.

2 Q. And your decision to turn yourself in, when you walked
3 into the police station, did you know you were going to be
4 looking at this 188 to 235 months?

5 A. Yes, that's what we talked about several times. As far
6 as the 188 months, well, I'm not going to say I was looking at
7 that, but that would have been the initial time that was being
8 imposed.

9 Q. Is it fair to say that you knew you were looking at that
10 kind of sentence on August 24th when you walked into the Erie
11 Police Department and said hey, there's a warrant out for me?

12 A. Yes, I did.

13 MR. PATTON: Those are my questions.

14 THE COURT: All right, Mr. Rogers, you can step down
15 now.

16 THE COURT: This is going to be an order.
17 Presenting pending before the court is an objection filed by
18 the defendant to the probation officer's conclusion that this
19 defendant qualifies for career offender status.

20 MR. PATTON: Your Honor, we don't dispute that he
21 qualifies for career offender status.

22 THE COURT: I was about to restate that, I realize I

23 misspoke, let me say that again. All right, let's start this

24 all over again, this is an order.

25 ORDER

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1 The defendant has filed objections to the
2 presentence report. The defendant argues that his career
3 offender status overstates the severity of Mr. Rogers' criminal
4 activity and he is entitled to a downward departure under
5 United States Sentencing Guideline 4A1.3. Specifically, the
6 defendant argues that his prior drug convictions represented
7 very small amounts of crack cocaine and that he was essentially
8 a "street dealer". The defendant also argues that it is only
9 by virtue of the peculiarities of Pennsylvania law that his
10 simple assault conviction qualifies as a crime of violence for
11 career offender purposes.

12 In United_States_v._Shoupe, 988 F.2d, 446, 447, (3rd

13 Cir. 1993), the court made it clear that a departure is only
14 warranted where the criminal history category significantly
15 over-represents the seriousness of the defendant's past conduct

16 and future threat to society. A review of the presentence

17 report in this case reveals that the defendant has engaged in

18 serious criminal activity since his early teens.

19 By way of summary, when he was 13, he pushed a

20 juvenile female, attempted to kiss her, remove her pants,

21 fondled her genital area. Sometime after that the defendant

22 and another individual followed a 10-year-old girl into an

23 alley, where her money was forcefully removed from her pants.

24 As a result of those incidents, he was adjudicated delinquent

25 on November 16, 1989. He was placed on juvenile court imposed

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1 probation and during that period of time additional allegations

2 were filed against him involving forcibly removing a Timex

3 watch. He was discharged from probation on April 25, 1991.

4 Several weeks after the discharge, allegations of robbery and

5 simple assault were lodged against him in juvenile court. They

6 involved in part, the defendant placing a man in a head lock

7 and slamming him to the ground, which apparently resulted in

8 injuries. Adjudication of delinquency was made on October 29,

9 1991. And he was discharged from intensive probation on

10 February 28, 1995. About a year after that, he was arrested
11 and charged with criminal conspiracy and two counts of delivery
12 of a controlled substance. Apparently, although, the offenses
13 involved two separate instances where the defendant had --
14 strike that. The underlying facts were there were two separate
15 incidents where the defendant sold 5.4 grams and 3.1 grams of
16 crack to an undercover individual. He pled guilty to all three
17 charges on November 15, 1996, and was sentenced to four years.
18 He was paroled on November 16, 1998, but violated his terms and
19 conditions and he was recommitted. He was paroled on November
20 18, 1999. And in February of 2000, he was arrested and charged
21 with simple assault. After that arrest, but prior to his
22 conviction, he was arrested and charged with possessing a
23 controlled substance, delivery of the same, loitering, two
24 counts of criminal conspiracy and driving without a license.
25 He pled no contest to those charges on December 6, 1996.

1 He was arrested at age 24 for simple assault. That apparently
2 involved the punching of a woman in the face after which her
3 jewelry was taken from her neck. He was paroled on July 28,

4 2003. And committed this offense on June 22, 2004.

5 With respect to the defendant's contention that the
6 relatively small amount of drugs justifies in and of itself a
7 departure in this case, I disagree. The drug quantity alone
8 does not appear to be an appropriate factor in justifying a
9 downward departure for career offender status. See United

10 States_v._Caldwell, 219 F.3d 1186 (10th Cir. 2000). To be

11 clear, even if a small drug quantity alone could, under
12 appropriate circumstances, be an appropriate consideration and
13 justify a downward departure, I would not find that a departure
14 was justified here on that basis. His extensive criminal
15 record that I described above really shows him, in my view, to
16 be a career criminal recidivist. And there has been in the
17 past no demonstrated efforts at any type of meaningful
18 rehabilitation.

19 The defendant also argues that his simple assault
20 conviction qualified as a crime of violence only because of the
21 peculiar treatment of simple assault under Pennsylvania law.
22 First, I note that he is a career offender without the simple
23 assault conviction by virtue of the previous drug convictions.
24 And, second, it is a crime of violence, that is simple assault,

25 Pennsylvania simple assault, under Third Circuit law. United

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1 States_v._Dorsey, 173 F.3d 331 (3rd Cir. 1999). Thirdly, given

2 his extensive criminal background, it is in my view entirely

3 appropriate to consider the simple assault as a crime of

4 violence in the career offender calculus.

5 The motion for downward departure pursuant to United

6 States Sentencing Guideline 4A1.3, insofar as it relates to his

7 status as a career offender, is denied.

8 MR. PATTON: Your Honor, just as a matter of

9 clarification, on the simple assault conviction you had

10 indicated that the victim was a female. That victim was

11 actually a male.

12 THE COURT: Thank you, Mr. Patton. Let the record

13 reflect that I misspoke and it was a male. Now, the government

14 argues that by virtue of this defendant having failed to appear

15 at his sentencing on June 19, 2006, and having been on the run

16 for approximately two months, until August 24, 2006, that he

17 has forfeited his right to the three-point acceptance of

18 responsibility. First, there is no question but that the
19 conduct engaged in by the defendant represents obstructing or
20 impeding the administration of justice under United States
21 Sentencing Guideline 3C1.1. Application Note 4 to United
22 States Sentencing Guideline 3E1.1, acceptance of
23 responsibility, provides in pertinent part:
24 "Conduct resulting in an enhancement under 3C1.1,
25 (obstructing or impeding the administration of

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1 justice) ordinarily indicates that the defendant has
2 not accepted responsibility for his criminal
3 conduct. There may, however, be extraordinary cases
4 in which adjustments under both Section 3C1.1 and
5 3E1.1 may apply."

6 In United_States_v._Muro, 357 F.3d 743, (8th Cir.

7 2004), the court had the occasion to address the appropriate
8 standard for the court to use in determining whether the facts
9 made out the "extraordinary case." The court stated:

10 "We apply a 'totality of the circumstances'

11 analysis to determine whether a case is 'an
12 extraordinary case' for purposes of applying the
13 exception." United_States_v._Honken, 184 F.3d 961,

14 968-69, (8th Cir. 1999). The district court should
15 consider, among other things, whether the
16 obstructive conduct was an isolated incident,
17 whether it was voluntarily or involuntarily
18 terminated, whether the defendant admitted and
19 recanted his obstructive conduct, to what degree he
20 accepted responsibility and aided the prosecution.

21 Id. The phrase "extraordinary cases" refers to

22 a narrow set of occurrences that are 'extremely rare
23 and highly exceptional.'" Id. at 969-70. "It is

24 not generally extraordinary when a defendant 'merely
25 ceases obstructive conduct.' A defendant must earn

1 an adjustment for acceptance of responsibility by
2 performing positive actions that counter his
3 negative ones."

4 In an effort to fill in some of the factual
5 background so that the court could make a more informed
6 decision as to whether this case in fact represented one of
7 those extraordinary cases, wherein, notwithstanding the
8 obstructive conduct, the three-point acceptance of
9 responsibility could nevertheless be obtained. I suggested,
10 and defense counsel concurred, as to the need for testimony
11 from his client. And his client chose to do so.

12 Based upon the testimony, I find the following
13 facts, insofar as they may inform my decision on the question
14 of the appropriateness of the denial of the three-point
15 acceptance. First, I do not view the flight on June 19th as an
16 isolated incident. The fact remains that the defendant was
17 gone for over two months. This is not an isolated incident in
18 the sense a discussion with an individual witness where
19 obstruction was alleged might represent an isolated incident.

20 The record reflects that throughout his absence, law
21 enforcement engaged in efforts to capture him, which required
22 some expenditure of resources. The defendant testified, and I
23 find it truthful, that he ultimately turned himself in because
24 he was too tired and "too stressed." Those would be natural

25 reactions to being constantly hunted. So I find that a driving

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1 force of his coming in was not genuine contrition, but the day
2 in and day out stressors of being on the run.

3 Further, the defendant also indicated in his
4 testimony that during the period of his absence, he was aware,
5 through various sources, that law enforcement were looking for
6 him in various parts of the country. So it was entirely
7 reasonable for him to conclude that the net was beginning to
8 tighten.

9 It's also of some moment to me that he stayed
10 apparently in the Erie area, and as result of which he
11 indicated that he had to lay low. Being in the Erie area,
12 rather than at some other distant point in the country or
13 elsewhere, it made it that much easier for him at any point in
14 time to have turned himself in. He also indicated that he saw
15 his picture in the paper and, of course, was aware that the
16 authorities were looking for him.

17 It is true that in this case the defendant did
18 voluntarily terminate his flee from justice. But, as I

19 previously indicated, in my view the termination was driven in
20 large measure by the fact that he was simply worn out from
21 running. The record should also reflect that I received a
22 letter from the defendant, the date of which, which is
23 undated -- it is postmarked October 2, 2006. And it's in
24 reference to this sentencing. And he indicates in part the
25 following: "I'm writing to you about the lengthy sentence that

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1 will be handed down to me on 10/11/06. Your Honor, would you
2 please take into consideration the fact that yes, I did flee
3 the state knowing I shouldn't have, that is why I turned
4 myself, Yakeen Rogers, into the authorities of the law. Your
5 Honor, I'm not in any way stating that I don't accept
6 responsibility because I am. Your Honor, it's just though I
7 feel I was entrapped, as we know from the investigation report
8 that Kenneth Thompson, my half brother, was the confidential
9 informant at hand." That, also, in my view doesn't suggest the
10 type of genuine contrition that an extraordinary circumstance
11 in my view would require.

12 Finally, in this case the defendant did not perform

13 and has not performed, in my view, any positive actions that
14 counter his negative ones. And so I find in this case, based
15 upon a careful review of the record, that this is not the
16 extraordinary case justifying relief.

17 All right, Mr. Patton, we're moving on now to
18 allocution insofar as the sentencing is concerned. Let me just
19 say something about this jump in guideline range. I understand
20 full well that it was a very high guideline before. I
21 understand it's a much higher guideline now. It's a very high
22 guideline, it is significant. But for what it's worth, the
23 other message here should be, aside from the fact that he did
24 not qualify, in my view, there was nothing extraordinary about
25 it. But, although, it does not happen frequently, we can't

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1 have a situation where people literally flee and are gone for
2 months without any ramification. This should be on the record,
3 too, there's a deterrent aspect to this. Now, we're going to
4 move on to the balance of the sentencing. Mr. Patton.

5 MR. PATTON: Your Honor, in response to your
6 statement that this sends a message that there's going to be

7 some consequence to not showing up, but the other message it

8 says is if you take off, there's no sense in turning yourself

9 in because you're just going to get whacked.

10 THE COURT: Quite independent of the deterrent

11 aspect, and I understand there is a ying and yang to that, I do

12 understand that. But all I'm saying is I did not and do find

13 any anything extraordinary on this record. And that's my

14 point.

15 MR. PATTON: Well, my point is, your Honor, to the

16 extent you think that that message is going to get out, to the

17 extent any message gets out from this sentencing, the point

18 that's going to get out is look, you might as well stay out on

19 the street as long as you can because even if you turn yourself

20 in, you're going to get the same sentence as if they go out and

21 they have to arrest you.

22 THE COURT: Look it, I'm not going to go back and

23 revisit it except to say this. Well, that's one way to look at

24 it. The other and in my opinion more productive way to look at

25 it is it forestalls people from doing it in the first place.

1 MR. PATTON: But that assumes people are thinking
2 rationally when they don't show up. And I know you made your
3 ruling, I'm not trying to talk you out of it. But there are
4 ramifications to it, to the extent --

5 THE COURT: Look it, I'm not crazy about giving this
6 huge sentence here. It's a long, long, long sentence. And Mr.
7 Rogers would have been far better off not doing what he did.
8 The original sentence was a long sentence. But it was always
9 in his hands. So let's move on to the rest of the sentencing.

10 MR. PATTON: Well, your Honor, I would submit that
11 if you look at, if you just look at the bottom end of the
12 guideline range, you're now talking about a six year and two
13 month increase in the sentence for failing to appear. I would
14 submit to you that when you -- even if you say you don't find
15 the case is extraordinary in the sense it allows you under the
16 guideline to say that Mr. Rogers should get acceptance of
17 responsibility even though he obstructed justice. When you are
18 deciding what is an appropriate sentence under 18 U.S.C.
19 Section 3553(a), you can say and take into consideration in
20 that consideration, well, in that context, excuse me, that Mr.
21 Rogers should get some benefit for turning himself in. I mean
22 regardless of what you think --

23 THE COURT: I agree with that, you're completely
24 preaching to the choir on that.

25 MR. PATTON: So I would submit that at most the bare

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1 minimum of the suggested guideline, 22 years, but that you can
2 go below that and exercising your discretion under Booker to
3 say that in this particular case, even though it does not
4 amount to an extraordinary case, that Mr. Rogers turned himself
5 in and the various reasons that you gave for that, that it is
6 something that calls for less than 262 months. Because Mr.
7 Rogers can clearly still receive a sentence that is higher,
8 significantly higher than he would have been looking at had he
9 not failed to appear. Therefore, it is made clear that if you
10 don't appear for your sentencing, there are consequences. I
11 don't think you have to increase the sentence by six years to
12 send that message.

13 And so I would submit that you can impose a sentence
14 of lower than 262 months, but higher than even the high end of
15 the range he was looking at of 235 months, say a sentence of

16 240 months, 20 years. To say look, you're going to get more
17 time if you don't show up. But also to say you are going at
18 least get some benefit if you turn yourself in. Even though
19 there's going to be a hit for it and there has been punishment,
20 and I understand that, judge, I don't think anybody could
21 rationally sit in front of you with a straight face and argue
22 that there shouldn't be any increase in punishment for someone
23 who fails to appear for their sentencing. There has to be.
24 The question is just how much.

25 I would submit that the 240 month sentence would be

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1 appropriate because it is above of what even his maximum
2 guideline range would have been had he shown up. But it also
3 recognizes the fact that he did turn himself in. And, your
4 Honor, anybody who turns himself in after being on the run, if
5 they're going to be honest with the court, they're going to say
6 to the court part of the reason I turned myself in is because
7 being on the run is just no way to live.

8 THE COURT: All right. Mr. Piccinini.

9 MR. PICCININI: Your Honor, although the defendant

10 did testify, he would still have the right to allocution prior

11 to sentence.

12 THE COURT: I think that's a fair point. I should
13 have picked up on it myself. Mr. Patton, does your client want
14 to speak, this is his opportunity at the sentencing phase to
15 speak?

16 MR. PATTON: May I have a moment, your Honor.

17 THE COURT: Sure. Could you come up to the podium,
18 it will be easier for you to use the microphone.

19 THE DEFENDANT: Your Honor, I know I'm here to be
20 sentenced today for this charge that I received. And, like I
21 said in the letter, I'm just asking that you can have on my --
22 I mean, I was not a bad person when I was out, I was trying to
23 get my life together. My brother put me in this situation, it
24 wasn't like that I was out hustling everyday. I was going to
25 work, I was going TO work and everything, working seven days a

1 week. I had a job babysitting on the side, I was trying to do
2 the right thing. I wasn't supposed to know, I was not supposed
3 to know my brother was in this situation and he involved me in

4 his situation. Me being the person, being a brother to my
5 brother, I thought I was doing him a favor for him, but he got
6 me jammed up in his situation. And now, like I said, I accept,
7 I know I was wrong, but someone has to account for it. I just
8 ask you have some type of open mind.

9 THE COURT: All right, thank you, Mr. Rogers.

10 THE DEFENDANT: Thank you.

11 THE COURT: All right, Mr. Piccinini.

12 MR. PICCININI: Your Honor, you were absolutely
13 correct that the sentence that you impose in this community
14 against drug dealers, the word gets out on the street. I know
15 on a daily basis from talking to members of the EAGLE Task
16 Force. That maybe Joe down the block, who is a law-abiding
17 citizen, it's not going to make a difference to him. But drug
18 dealers talk. And when the word gets out that in Judge
19 McLaughlin's courtroom if you don't show up for your sentence
20 on a federal drug conviction, you're going to get hit. And
21 what it makes very clear is that when you obstruct justice in
22 the federal court system, there are going to be ramifications.
23 And the thought that imposing that increased sentence in some
24 way will cause people not to turn themselves in, is not that
25 great of a concern, your Honor. Because those people are

1 giving to be living under the pressure that Mr. Rogers was
2 living everyday, worried about law enforcement coming after
3 them. They're not going to say hey, I'm worried about law
4 enforcement, I might as well stay out. They're going to feel
5 the presence of law enforcement. If they don't turn themselves
6 in, they're going to be caught.

7 You have in front of you, your Honor, a defendant
8 who clearly deserves everything he gets here today as a career
9 offender. And this is hard lesson for anyone to learn. When
10 he talks about how he was doing good while he was out, he has
11 never done good while he was out. In drug deals or drug
12 convictions one and two, you look at the history throughout the
13 course of his way in which he acted in this community while on
14 parole or probation or some lesser form of confinement, and he
15 failed in that regard. When you look at whether he learned a
16 lesson after the first crack deal, about stopping selling crack
17 on the street. He didn't learn that in the first, he didn't
18 learn that in the second. Now, after the third, what you hear
19 during his right of allocution is that come on, this isn't that

20 big of deal, I just sold to my step brother. Well, it is a big
21 deal. It was a big deal when you sold crack the first two
22 times, it's a big deal today. I don't care what the quantity
23 is, it's a big deal. You're a drug dealer, you were given
24 multiple opportunities from the age of 13 to straighten out
25 your life. I can never figure it out and it's unfortunate when

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1 I read this defendant's background because I knew before this,
2 just from reading the background, that he'd be back committing
3 crimes again. That's a shame in the system. Well, he's done,
4 he won't be back again. The sentence within the guideline
5 range, and I give the defendant the fact he turns himself in.
6 There is a significant range between 262 months and 327 months.
7 Because he turned himself in, he doesn't deserve the 327
8 months. But a sentence at the low end of that guideline range,
9 the lowest sentence you can give him under the guideline range,
10 serves the purposes of making it clear that he did get credit,
11 he lost some 55 months or so from what he could have gotten
12 here today because of the things that we learned today about
13 him turning himself in. But he doesn't deserve any break

14 larger than that. To give him a sentence of 240 months is only
15 five months higher than the high end of the guideline range had
16 he not failed to show up for sentencing. And I think all of
17 this unfortunate. Nobody wants to walk through this courtroom
18 and have this man leave facing a 262 month sentence. But it's
19 nobody's fault in this courtroom that he's getting it. This
20 all goes back to Mr. Rogers. And even while released on
21 conditions of bond in this courtroom, he couldn't even show up
22 to stand up and take the punishment, which several months ago
23 would have been a lot shorter than it is today. And I agree
24 with the court that there has to be a consequence, and a 262
25 month sentence metes that out.

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1 THE COURT: I make the following findings. Given my
2 previous rulings, the total offense level applicable is 34.
3 With a criminal history category of VI. Statutory provision as
4 to custody not less than 5 to 40 years imprisonment.
5 Guidelines 262 to 327 months. Statutory provision as to
6 probation ineligible. Also ineligible under the guidelines.
7 Statutory provision as to supervised release at least four

8 years. Guidelines four to five. Statutory provision as to a
9 fine \$2 million. The guidelines \$17,500 to \$2 million.
10 Restitution is inapplicable under both. A special assessment
11 of \$100 applies with respect to both.

12 All right, would you stand up, Mr. Rogers, please.

13 In fashioning this sentence, I am required to
14 consider various factors. The nature and circumstances of the
15 offense. I have done that. Of course, this is a serious
16 offense.

17 The background of this defendant. As I indicated
18 more fully on the record here today, that background reflects a
19 long and steady period of criminal activity sufficient at the
20 end of the day to support the career offender status, as part
21 of the calculus into his background.

22 Of course, I also note the fact that part of the
23 guideline range here is driven by the failure to appear, and
24 his absconding for two months. However, I also take into
25 consideration the fact that at the end of the day, so to speak,

1 he did turn himself in, rather than actually having been

2 captured by law enforcement officials.

3 A sentence here should reflect and appropriately
4 reflect the deterrent value of a sentence, as well as
5 protection of the public. So I've considered all those
6 factors.

7 Pursuant to the Sentencing Reform Act of 1984, it is
8 the judgment of the court that the defendant, Yakeen Rogers, is
9 hereby committed to the custody of the Bureau of Prisons to be
10 imprisoned for a term of 262 months.

11 Upon release from imprisonment, the defendant shall
12 be placed on supervised release for a term of four years.

13 Within 72 hours of release from the custody of the
14 Bureau of Prisons, the defendant shall report in person to the
15 probation office in the district to which this defendant is
16 released. While on supervised release, the defendant shall not
17 commit another federal, state or local crime, shall comply with
18 the standard conditions of supervision recommended by the
19 Sentencing Commission and adopted by this court, and shall
20 comply with the following additional conditions.

21 The defendant shall not illegally possess a
22 controlled substance.

23 The defendant shall not possess a firearm or

24 destructive device.

25 The defendant shall participate in a program of

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1 testing and, if necessary, treatment for substance abuse as

2 directed by the probation officer, until such time as the

3 defendant is released from the program.

4 Further, the defendant shall be required to

5 contribute to the costs of services for any such treatment in

6 an amount determined by the probation officer but not to exceed

7 the actual cost.

8 The defendant shall submit to one drug urinalysis

9 within 15 days after being placed on supervision and at least

10 two periodic tests thereafter.

11 It is further ordered that the defendant shall pay

12 to the United States a special assessment of \$100, which shall

13 be pay to the United States District Court Clerk forthwith.

14 I find this defendant does not have the ability to

15 pay a fine and so I will waive a fine in this case.

16 Mr. Rogers, do you understand that you do have the

17 right to appeal this sentence which I imposed here today, but

18 in order to do so, you must do so within 10 days; do you

19 understand that, sir?

20 THE DEFENDANT: Yes.

21 THE COURT: Is there anything that needs to be

22 dismissed?

23 MR. PICCININI: No, your Honor, there is just one

24 count.

25 THE COURT: All right, we're adjourned.

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1 (Whereupon, at 11:44 a.m., the Sentencing

2 proceedings were concluded.)

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7 C E R T I F I C A T E

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11 I, Ronald J. Bench, certify that the foregoing is a
12 correct transcript from the record of proceedings in the
13 above-entitled matter.

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18 _____

19 Ronald J. Bench

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